



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cryogenic Consultants, Inc.

File: B-225520

Date: March 4, 1987

DIGEST

1. Award of contract under a defective solicitation is proper where the record clearly shows that the award under the solicitation as issued serves the actual needs of the government and does not prejudice the other competitors.
2. Protest is denied where there is no indication that alleged errors in calculating protester's total offered price adversely affected the protester's competitive standing. --
3. Procuring agency properly did not evaluate cost of upgrading equipment where request for quotations did not provide for such evaluation.
4. Protest that agency did not include protester on its quoters' list is denied where agency gave protester opportunity to quote.
5. Protest that the request for quotations for cryogenic refrigerator system unduly restricts competition must be filed before the closing date for receipt of quotations.
6. Where there is no evidence in the record, other than the protester's bare allegation, that the contracting agency conducted the procurement in a manner that favored the awardee, the protester has not met its burden of affirmatively proving its case. Unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition.

DECISION

Cryogenic Consultants, Inc. (CCI), protests the award of a contract for a cryogenic refrigerator system to Koch Process Systems, under request for quotations (RFO) No. 2-LXE-0351G, issued by the Los Alamos National Laboratory (LANL). LANL is a Department of Energy facility operated by the University of

038198

California pursuant to a management and operating contract. CCI protests that its proposal was improperly evaluated and that LANL was biased towards Koch.

We deny the protest in part and dismiss it in part.

An RFO was issued on July 31, 1986, to four potential sources that LANL considered capable of supplying the refrigerator system. The original quote due date of August 29, 1986, was extended to September 22, 1986, when two sources, Koch and CVI, Inc., requested additional time. On September 22, 1986, CCI contacted LANL and asked for the opportunity to quote. LANL agreed to review an unsolicited proposal, which LANL received on October 2, 1986. Based on its review, LANL sent a complete RFO package to CCI on October 14, 1986, and extended the RFO due date to October 22, 1986. Proposals from Koch, CVI and CCI were received by the due date. LANL evaluated total quotations at \$357,350 for Koch, \$377,956 for CCI and \$436,306 for CVI. LANL awarded a contract to Koch as the low quoter.

CCI protests that when evaluating proposals, LANL penalized CCI by adding \$10,466, the price quoted as an option by CCI for a vacuum diffusion pump, to CCI's system price. CCI argues that because a vacuum diffusion pump was never mentioned as a requirement in the specification, adding the cost for the pump to CCI's evaluated price is without justification.

LANL reports that although a vacuum system was not mentioned in the RFO, cryogenic refrigerator systems must be equipped with vacuum systems that include vacuum pumps. According to LANL, vacuum systems are used to evacuate the cold box after a vacuum has been broken either intentionally or unintentionally and to remove gases entering the vacuum space either through outgassing or small leaks. Of the three quotes received by LANL, vacuum systems were included in the basic price of two quotes, and given as an option in the CCI quote. LANL maintains that since a vacuum system is required to meet its needs, it was proper to include the CCI vacuum system option when pricing CCI equipment.

Even though the specification should have provided for a vacuum diffusion pump, the award of a contract under the solicitation is proper if the record clearly shows that the award under the solicitation as issued serves the actual needs of the government and does not prejudice the other competitors. See GAF Corp., et al., 53 Comp. Gen. 586 (1974); Dantronics Inc., B-222307, June 30, 1986, 86-2 C.P.D. ¶ 17. The record here shows that the award to Koch

under the solicitation serves the actual needs of the government for evacuating the cold box. Since the solicitation understated rather than overstated the agency's needs, other offerors would not be prejudiced by an award to Koch based on their low offers which included the price of the pump. LANL used the price CCI actually quoted for the pump as an option in determining that Koch was the low quoter, and CCI does not argue that it would have offered the pump at a lower price if LANL had more carefully stated its needs and required characteristics.

CCI also complains that the evaluators assumed without basis that its proposal did not include a required heater. CCI states that it never said a heater would not be furnished and that the heater was included in its equipment offer, although the heater was not specifically mentioned in its proposal. CCI notes that it stated in its proposal transmittal letter that the proposal was in total compliance with the specification.

Our review of the record indicates that CCI was not prejudiced by LANL's alleged misinterpretation of CCI's proposal. LANL reports that although it appeared that CCI's proposal offered a slide valve adjustment rather than the required electric heater, it did not include the cost of the heater when evaluating the cost of proposals. Assuming CCI's offer included the electric heater, CCI's offer was not low. Since price was the determinative factor and there is no indication that CCI's competitive standing was adversely affected, we deny CCI's protest on this basis. See Nickum & Spaulding Associates, Inc., B-222468, June 10, 1986, 86-1 C.P.D. ¶ 542.

CCI also protests that LANL should have evaluated CCI's proposal on the basis of 10 days start-up service, not 30 days, because LANL evaluated Koch's proposal on the basis of 10 days start-up supervision, and the two systems are fundamentally similar. CCI points out that the RFQ specifically states that start-up supervision shall be quoted on a per diem basis and that the number of days for installation supervision will be determined at the time of contract award. Since CCI furnished a per diem rate of \$583, CCI argues its start-up services for 10 working days would cost \$5,830 as opposed to the \$17,490 cost for 30 days service evaluated by LANL.

Even accepting CCI's argument that LANL should have evaluated the Koch proposal and the CCI proposal using the same number of days for start-up services, we do not find that CCI suffered competitively from LANL's evaluation. If both Koch and CCI were evaluated on the basis of 10 days start-up

service, Koch's evaluated price of \$359,203 (\$357,350 plus \$1,853 freight) would remain lower than CCI's offer of \$366,296. Koch's price on the basis of 30 days start-up service would also be lower than CCI's price on the basis of 30 days service. Since the protester has shown no prejudice, we deny its protest on this basis. See Pitney Bowes, B-213691, Apr. 24, 1984, 84-1 C.P.D. ¶ 472.

CCI also alleges that LANL added \$20,000 to its price to account for an ambiguously stated test requirement. However, the record shows that LANL clarified for CCI a specification requirement for testing at the vendor's facility before shipment, and that CCI agreed to increase its price by \$5,000 to account for the test requirement. LANL included \$5,000 in CCI's evaluated price, not \$20,000.

CCI also protests that LANL did not give it credit for offering a base price which included features which Koch's base price did not. CCI notes that vendors were asked to provide an estimate of the cost to produce upgraded features, which its base system already included and for which Koch would charge an additional \$240,500.

For LANL to evaluate the cost of upgrading the equipment for award purposes, the RFQ would have had to specifically provide for such evaluation. See AMS Manufacturing, Inc.--Reconsideration, B-203589.2, Nov. 2, 1981, 81-2 C.P.D. ¶ 371. Since the RFQ did not provide for evaluating the costs to produce upgraded features, LANL properly did not evaluate such costs.

CCI contends that it was not given a fair chance to participate in the procurement due to the personal preferences of one or more of the technical staff for Koch. CCI argues that it was initially excluded from the solicitation, and that the technical specification was heavily slanted toward a Koch Process system refrigerator. CCI believes subsequent procurement actions were aimed at ensuring Koch was the successful vendor.

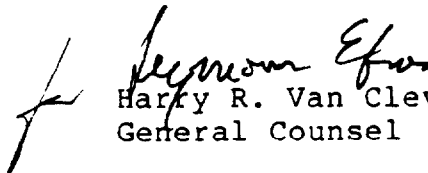
We fail to see how CCI was prejudiced by its exclusion from the original quoter's mailing list. When CCI notified LANL of its interest in quoting, LANL gave CCI an opportunity to quote. Since prejudice is an essential part of a protest, this aspect of CCI's protest is without merit. See Micro Research, Inc., B-220778, Jan. 3, 1986, 86-1 C.P.D. ¶ 9.

To the extent CCI complains that the specification was unduly restrictive, the protest is untimely. Our Bid Protest Regulations require that a protest of solicitation

improprieties apparent prior to the closing date for the receipt of proposals (or quotations) be filed prior to the time for closing. 4 C.F.R. § 21.2(a)(1) (1986); American Ball Screw, B-223915, Dec. 10, 1986, 66 Comp. Gen. _____, 86-2 C.P.D. ¶ 664. Since the closing date was October 22, 1986, and the protest was not filed until November 26, we will not consider this issue. We note that the argument that a specification was "written around" a competitor's product is not by itself a valid basis of protest. See California Mobile Communications, B-223614.2, Aug. 19, 1986, 86-2 C.P.D. ¶ 200.

We find no evidence in the record, other than CCI's bare allegations, that LANL conducted the procurement in a manner that favored Koch. The protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Institute for Advanced Safety Studies, B-221330, Apr. 16, 1986, 86-1 C.P.D. ¶ 72.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel